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CITATIONS

205-472—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 256

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN W. COOK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the district court dismissing the indictment (R. 4–5) is not reported.

JURISDICTION

On March 18, 1965, the district court dismissed the indictment on the ground that 18 U.S.C. 660 does not extend to the conduct of an employee of an individual engaged in commerce as a common carrier (R. 4–5). Notice of appeal to this Court was filed in the district court on April 16, 1965 (R. 8–9), and probable jurisdiction was noted on December 13, 1965 (R. 9). The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment based upon a

construction of the statute on which the indictment is founded is conferred by 18 U.S.C. 3731.

QUESTION PRESENTED

Whether 18 U.S.C. 660, prohibiting certain embezzlements by employees of "any firm, association, or corporation engaged in commerce as a common carrier," applies to the conduct of an employee of an individual doing business as a common carrier.

STATUTE INVOLVED

18 U.S.C. 660 provides, in pertinent part:

> Whoever, being a president, director, officer or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.
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> * * * * *

STATEMENT

On December 15, 1964, an indictment was returned in the United States District Court for the Middle District of Tennessee alleging that, while riding on

his employer's truck, appellee, "a truck driver for Tolbert Hawkins, an individual engaged in commerce as a common carrier," embezzled approximately $200.00 "of the monies of said carrier" accruing from an interstate shipment of bananas (R. 1). On appellee's motion (R. 3–4), the district court dismissed the indictment. The court held that the indictment failed to charge an offense within 18 U.S.C. 660 because it charged that appellee "acted as an employee of 'an individual'" while Section 660 "only forbids the proscribed acts when committed by employees of a 'firm, association or corporation'" (R. 4–5).[1]

ARGUMENT

INTRODUCTION AND SUMMARY

In describing the common carrier entities protected from embezzlement by 18 U.S.C. 660, Congress used

[1] A similar construction of Section 660 was adopted by the Court of Appeals for the Tenth Circuit in 1950 in *Schmokey* v. *United States*, 182 F. 2d 937, the only other case we have been able to find dealing with the question whether a carrier owned by an individual is protected from embezzlement by Section 660. The *per curiam Schmokey* decision did not consider whether the exclusion of individually owned carriers from the protection of Section 660 would be consistent with the purposes served by Section 660, nor did it suggest that Section 660 could not be read to include individually owned carriers within the language "any firm, association, or corporation engaged in commerce as a common carrier." Instead, the court relied upon the proposition that a "criminal statute must be strictly construed * * *" (182 F. 2d at 937–938). We submit, *infra*, pp. 15–17, that the doctrine of strict construction is not dispositive of this case in light of the lack of any conceivable legislative purpose to exclude carriers owned by individuals from the protection of the Act, while including carriers owned in forms of multiple ownership.

the phrase, "any firm, association, or corporation engaged in commerce as a common carrier." This statutory language, we submit, applies to embezzlements committed against individuals engaged as common carriers, as well as to embezzlements of the funds of corporations, partnerships and other associations. The legislative purpose to include within the protection of the statute all common carriers, regardless of the particular form of ownership of the business, appears unmistakably from the history of the statute which shows that all carriers—including individually owned carriers—were protected from employee embezzlement by the immediate predecessor to Section 660. No change in the scope of this protection was intended by the 1948 ~~version~~ revision of the Criminal code. There is, in addition, no conceivable reason to attribute to Congress a legislative purpose to exclude individually owned carriers from the statute's protection while protecting all forms of multiple ownership, regardless of size. In these circumstances, the doctrine of "strict construction" should not be used to override the evident statutory purpose.

I.

THE PREDECESSOR OF SECTION 660 CLEARLY APPLIED TO EMBEZZLEMENTS BY THE EMPLOYEES OF INDIVIDUALS ENGAGED AS COMMON CARRIERS

Section 660 punishes embezzlements from a common carrier by either (1) "a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier," or (2) "an employee of such common carrier riding in or upon any * * * vehicle of such carrier moving in

interstate commerce." While embezzlements of carrier funds[2] by both categories of persons are thus covered by a single statutory provision in the present Code, the separate groups—named executives, and employees riding in vehicles in commerce—were the subject of distinct criminal provisions before the 1948 revision.

The language relating to executives derives from Section 412 of the Criminal Code (18 U.S.C. (1946 ed.) 412). This provision was originally enacted as part of the Clayton Act of 1914 (38 Stat. 730, 733–734) in reaction to a multi-million dollar fraud which had been perpetrated on the New York, New Haven and Hartford railroad. It was modeled after a similar provision in the National Banking Act (See 51 Cong. Rec. 14031–14032).

Section 412, like present Section 660, applied to named executives of "any firm, association, or corporation engaged in commerce as a common carrier" who embezzled carrier funds arising from or used in commerce. In pertinent part, Section 412 read as follows:

> Every president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, who em-

[2] The statute does not punish all embezzlements by the designated persons, but only appropriations of "any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce * * *." The indictment in this case charged the appellee with appropriating monies of his employer "arising and accruing from an interstate shipment of bananas from Tampa, Florida, to Lebanon, Tennessee" (R. 1).

> bezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony * * *.

The provision of the Banking Act on which Section 412 was apparently patterned (R.S. 5209; Section 55 of the National Banking Act of 1864, 13 Stat. 116, as amended) proscribed embezzlements by certain employees of any banking "association," defined in R.S. 5133 as "any number of natural persons, not less in any case than five." The provision of Section 412 protecting "any firm, association, or corporation engaged in commerce as a common carrier" was clearly designed to be of more general applicability. We submit that it is a fair inference, from this context and language alone, that the phrase "any firm, association, or corporation engaged in commerce as a common carrier" was designed to apply to all common carriers, regardless of their particular form of ownership. A "firm" may be any business organization—individually owned or otherwise[3]—and there seems little reason for its inclusion in the statutory phrase in Section 412 (in addition to words covering

[3] Webster's *Third New International Dictionary—Unabridged* (1961 ed.) p. 856, defines "firm" not only as "a partnership of two or more persons not recognized as a legal person distinct from the members composing it," but also as "the name, title, or style under which a company transacts business: the firm name" and any "business unit or enterprise." See, also, *New English Dictionary*, Vol. IV, p. 247 (Oxford 1901).

associations—including partnerships—and corporations) except as a general term extending to all other forms of carrying on business as a common carrier. In all events, as we now show, it was entirely clear prior to the 1948 Code that the "employee" embezzlement provision (which was combined in the 1948 revision with Section 412 in a single new Section 660) was applicable regardless of the carrier's form of organization.

The "employee" provision, prohibiting embezzlements by an employee of a carrier riding on a vehicle of the carrier moving in interstate commerce, was derived from Section 409(a)(5) of the 1946 Criminal Code. Section 409(a)(5) (60 Stat. 656–657) was one of a series of broadening amendments to a still earlier 1913 statute dealing with the prosecution of larcenous conduct affecting surface carriers in interstate commerce. (See H. Rep. No. 415, 62d Cong., 2d Sess., p. 1). Just prior to the enactment of Section 409(a)(5), the larceny provision covered larceny of property in commerce from the premises or vehicles of "any person, firm, association, or corporation" carrying the stolen shipment (43 Stat. 793), thus clearly disregarding the form of ownership of the carrier. Moreover, this language had come into the statute in 1925 under circumstances particularly suggesting Congress' concern to protect small local carriers.[4]

[4] Such carriers had, to some extent, been held to be outside the protection of the original 1913 Act. See *Beckerman* v. *United States*, 267 Fed. 185 (C.A. 7); see also *Hearings, on Transportation of Interstate Shipments From Wagons, Automobiles, Trucks, etc.*, before The House of Representatives Committee on the Judiciary, 68th Cong., 1st Sess., pp. 2–27 (1924); H. Rep. No. 389, 68th Cong., 1st Sess.; S. Rep. No. 814, 62d Cong., 2d Sess.

In 1946, Congress undertook a general clarification of this larceny statute; at the same time, it broadened the scope of the statute to include embezzlement as well as larceny and to cover air as well as surface transportation. (See H. Rep. No. 1116, 79th Cong., 1st Sess., p. 1; S. Rep. No. 1632, 79th Cong., 2d Sess., pp. 1–2.) The result was Section 409 of the 1946 Criminal Code (18 U.S.C. 409 (1946 ed.)). A subpart of this section, Section 409(a)(5) (60 Stat. 656, 657), covered embezzlements by employees of "*any carrier* * * * transporting passengers or property in interstate or foreign commerce" while such employees were riding on their employers' vehicles in interstate commerce (emphasis added).[5]

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[5] The legislative history underlying the adoption of the new employee-embezzlement provision indicates the continuing lack of any limitations based upon the form of ownership of the carrier. In March, 1945, Senator McCarran introduced a bill (S. 739, 79th Cong., 1st Sess.) which would have made it a crime to embezzle funds belonging to or in the lawful possession of a carrier "arising or accruing from" interstate commerce when the embezzlement was committed by a "director, officer, or employee of any person, firm, association or corporation engaged in commerce as a carrier * * *." In express terms, the proposed statute thus included all employees of all carriers, regardless of their form of ownership. On June 21, 1945, a hearing was held by a subcommittee of the Senate Committee on the Judiciary on both this proposal and a companion piece of legislation proposed by the Department of Justice. (This hearing, designated herein as "H," was not printed. A full transcript, plus additional recommendations from interested parties, including Attorney General Francis Biddle, which were considered by the subcommittee, is available at the Legislative Branch, National Archives Building, Washington, D.C.). At this hearing the General Counsel of the American Trucking Association, a national association of both common and private carriers, testified that "the size and the enormity of the embezzlement problem" was very real in the industry (H. 20);

Section 409(a)(5) provided in full:

> (a) Whoever shall—
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> * * * * *
>
> (5) being an employee of any carrier riding in, on or upon any railroad car, motortruck, steamboat, vessel, aircraft, or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle or unlawfully convert to his own use any such funds; shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both.

The provision, in terms, covered an employee of "any carrier" regardless of the form of the employers' ownership. It unquestionably and deliberately covered the employees of individuals engaged as com-

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that passage of a bill like S. 739 and one or two successful prosecutions thereunder would serve as a real deterrent to employee dereliction (H. 21); that state prosecutions were rare and infrequent since "State officials [say] they have no jurisdiction over interstate crimes" (H. 23, H. 22); and that members of the Association have lost "thousands of dollars" every year "from this type of offense which is not covered by a federal law and which the state courts are unable to handle" (H. 32). The Justice Department opposed the bill primarily on the ground that it would bring into federal courts minor embezzlements and thefts of a local nature which were better left to state action (H. 10). The Department of Justice recognized the problem faced by the truckers but was of the view that it could "be adequately dealt with," by less encompassing legislation (H. 29–30, 33).

The employee embezzlement provision ultimately adopted in 1946 (H.R. 4180) was different in form from S. 739 (upon which no further action was apparently taken). In view of its application in terms to "any carrier," however, it obviously was meant to have application regardless of the form of the

mon carriers.[6] It remains only to point out that, by combining this employee-embezzlement provision of Section 409(a)(5) with the executive-embezzlement provision of Section 412 in the 1948 revision of the Criminal Code, Section 660, Congress intended no diminution of the scope of either section.

II.

THE 1948 REVISION OF THE CRIMINAL CODE DID NOT NARROW THE APPLICATION OF THE EMBEZZLEMENT PROVISION TO EXCLUDE PROTECTION TO CARRIERS OWNED BY INDIVIDUALS

In the 1948 revision of Title 18, the employee-embezzlement provision of Section 409(a)(5) of the 1946 Code was joined with the executive-embezzlement provision of Section 412 of the 1946 Code. The result

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carrier's ownership. It was enacted over the very same objections as to its breadth that had earlier been raised by the Department of Justice. See the letter from Attorney General Clark (as he then was) to the Senate Committee in opposition to H.R. 4180, contained in S. Rep. No. 1632, 79th Cong., 2d Sess., pp. 2–3. The Attorney General further urged, in particular, that the word "common" should be inserted before the word carrier or otherwise "the bill would apply to theft or embezzlement even from a private automobile if it is being used to take baggage across State lines." There seems no question that in thus passing this legislation over the objections of the Department of Justice, Congress intended no limitation which would bar application of the new provision to carriers owned by individuals.

[6] This meaning of the words "any carrier" is evident, not only from the language and the history detailed in footnotes 4 and 5, *supra*, but is further supported by the fact that the Interstate Commerce Act of 1887 (24 Stat. 379, as amended 41 Stat. 474, now Interstate Commerce Act, Part I, 49 U.S.C. 1(3)(a)) defines "common carrier" to include "all persons, natural or artificial." See also the Motor Carrier Act of 1935 (44 Stat. 543, as amended 49 U.S.C. 303(a)), defining contract carriers and common carriers by motor vehicle as "any person" ((a)(14) and (15)) and any person as including "any individual * * *" ((a)(1)).

was a new Section 660. In merging these two provisions, Congress used the language "any firm, association, or corporation engaged in commerce as a common carrier," appearing in former Section 412, to describe the entities protected, rather than the language "any carrier * * * transporting passengers or property in * * * commerce" of former Section 409. For reasons which we specify below, it is clear that in doing so Congress had no purpose to narrow the reach of the prohibition upon employee embezzlement in order to exclude protection to carriers owned by individuals. Rather, Congress plainly understood the two phrases, "any carrier * * * in * * * commerce" and "any firm, association, or corporation engaged in commerce as a common carrier," as equivalents. It evidently found the latter phrase, derived from Section 412, stylistically more suitable for use throughout the new section because the new provision began with an incorporation of the language of Section 412 covering executive embezzlements.

a. Had Congress understood the phrase, "any firm, association, or corporation engaged in commerce as a common carrier," to be any narrower in application than the phrase, "any carrier * * * in * * * commerce," the result of the 1948 revision would have been to restrict the scope of the coverage of the employee-embezzlement provision which previously, in terms, covered "any carrier * * * in * * * commerce." Such a change, if it had been thought to exclude from Section 660 individually owned carriers previously covered under Section 409(a)(5), would have been of major substantive significance. The 1948 revision, however, was not a revision of substance, un-

less the contrary was stated with specific clarity.[7] The Senate Judiciary Committee Report accompanying the bill which became the 1948 revision noted that the general purpose was only "to codify and revise * * *. The original intent of Congress is preserved." S. Rep. No. 1620, 80th Cong., 2d Sess. p. 1. With regard to the issue in this case, no intention to change the former provisions was declared. On the contrary, the Reviser's Note accompanying Section 660, while it notes that the section "consolidates a portion of Section 409 with Section 412," states only (so far as relevant here) that "[c]hanges were made in phraseology."

b. The only conclusion consistent with this manifested legislative purpose is that the phrase "any firm, etc." was deemed the equivalent of the phrase "any carrier, etc." This conclusion is further underscored by the fact that the Revisers retained the phraseology "any * * * carrier" in Section 659 of the 1948 Code, into which the provisions of Section 409 other than subsection (a)(5) were placed. The originally uniform coverage of Section 409 was, we submit, clearly not designed to be interrupted in the 1948 revision simply by the transfer of one of the provisions of Section 409 to the next succeeding section of the Code. This Court's statement with regard to revision of Title 28 in 1948 in *Fourco Glass Co.* v. *Transmirra,* 353 U.S. 222, 227 (quoting from an earlier decision) is fully applicable in these circumstances:

> "The change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as

[7] See *Honea* v. *United States*, 344 F. 2d 798 (C.A. 5).

> altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed [citations omitted]."

See, also, *United States* v. *Welden*, 377 U.S. 95, 98–99, n. 4.

c. Finally, it would be wholly unreasonable, we believe, to attribute to Congress the intention to make criminal liability under Section 660 turn on whether a carrier from which funds are embezzled is individually owned, on the one hand, or is a partnership, other association, or corporation, on the other. The absence of any criteria of size in Section 660 shows that Congress intended the section to apply to small as well as to large carriers; indeed the small operator may well be the easier prey for embezzlement and most in need of the statutory protection. A small carrier will surely be less able to bear the losses occasioned by the embezzlement of the proceeds of individual shipments, the type of situation here involved.

Individually owned carriers comprise a large portion of these small carriers engaged in commerce.[8] Having undertaken to protect small as well as large carriers from employee embezzlement through a

[8] Our recent examination of the records of the Interstate Commerce Commission showed that there were 11,700 Class III motor carriers of property (*i.e.*, those with an annual revenue of less than $200,000). A random sampling of the business structure of approximately 1,500 of these showed that as of the end of 1964 almost 40% of the sample were individually owned and operated and had a total of 2,000 employees. During the same period only about 1% of the 1,500 operated in partnership form. The remainder operated as corporations.

criminal statute, it would attribute a capricious legislative purpose to infer that Congress meant to distinguish among such carriers based upon their form of ownership, immunizing from criminal sanctions the employees of individually owned carriers while punishing precisely the same conduct when committed by identically placed employees of small partnerships or wholly owned individual or family corporations. The formal structure of the employer's business is a wholly irrelevant consideration in the application of such a statute and there is no reason to suppose that Congress thought otherwise. In sum, the purpose, as well as the language and history of Section 660, show its applicability to carriers without regard to their form of ownership.

III.

THE DOCTRINE OF "STRICT CONSTRUCTION" DOES NOT REQUIRE THE EXCLUSION OF CARRIERS OWNED BY INDIVIDUALS FROM THE PROTECTION OF SECTION 660

We have shown above that the exclusion of carriers owned by individuals from the protection of Section 660 can be accomplished only by giving the phrase "any firm, association, or corporation engaged in commerce as a common carrier" a narrow construction inconsistent with the purposes and the history of the legislation. In these circumstances, such a strict construction should not be adopted. The rule of strict construction of criminal statutes "is not an inexorable command to override common sense and evident statutory purpose." *United States* v. *Brown,* 333 U.S. 18, 25. On the contrary, "[i]t is sufficient if the words are given their fair meaning

in accord with the evident intent of Congress." *United States* v. *Raynor*, 302 U.S. 540, 552.

In this case, moreover, there is no danger of misleading potential defendants who might legitimately believe their conduct to be lawful in reliance upon a narrow construction of the statute. Whatever the reach of Section 660, the conduct it prohibits is clearly unlawful. Nor is there a danger here of expanding Congress' words beyond their originally intended consequences. As we have shown *supra*, pp. 7–12, employee embezzlements from individually owned carriers were clearly covered by the employee-embezzlement provision enacted in 1946, and there was no manifestation of a purpose to narrow this prohibition in the 1948 revision. Since the word "firm" can naturally be read in its context to include common carriers doing business in the form of individual proprietorships (see footnote 3, p. 6, *supra*), that construction vindicating the purposes and history of the legislation should be adopted.[9]

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[9] Compare *United States* v. *Alpers*, 338 U.S. 680, 681–683, holding that the words "book, pamphlet, picture, motion-picture film, paper, letter, writing, print" as used in a criminal obscenity statute did not immunize the transfer of obscene "phonograph records" in interstate commerce. In reaching this judgment, the Court rested on settled doctrine that the rule of *ejusdim generis* is not to be used to "defeat the obvious purpose of legislation." Similar principles have been applied in situations close to the present case. For example, in *United States* v. *A & P Trucking Co.*, 358 U.S. 121, the question was whether 18 U.S.C. 835, which punished "whoever" violated certain regulations of the Interstate Commerce Commission, reached a partnership *qua* partnership. Despite the usual common law rule that a partnership was not an entity for purposes of suit, this Court followed the legislative purpose in holding that such liability could attach. In *United States* v. *Shirey*, 359 U.S. 255, the Court, in effectuating Congres-

CONCLUSION

The judgment of the district court should be reversed and the indictment reinstated.

Respectfully submitted.

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JANUARY 1966.

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sional purpose, held that a gift to the "Republican Party" was covered by a statute which prohibited payment to a "person, firm or corporation" in exchange for an appointive office in the United States Government. In *United States* v. *Bramblett*, 348 U.S. 503, 506, after an extensive discussion of legislative history, this Court ruled that a false statement "in any matter within the jurisdiction of any department or agency of the United States," covered a fraudulent statement to the "Disbursing Office of the House of Representatives." The rationale articulated in *Bramblett* is equally applicable here (348 U.S. at 509):

> The context in which the language is used calls for an unrestricted interpretation. This is enforced by its legislative history. It would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section shows that "department," as used in this context, was meant to describe the executive, legislative and judicial branches of the Government.

See also *United States* v. *Union Supply Co.*, 215 U.S. 50, 55; *Boston Sand Co.* v. *United States*, 278 U.S. 41, 48; *Roschen* v. *Ward*, 279 U.S. 337, 339; *United States* v. *Hood*, 343 U.S. 148, 150–151; *United States* v. *Turley*, 352 U.S. 407, 412–413; *United States* v. *Dege*, 364 U.S. 51, 52; *United States* v. *Braverman*, 373 U.S. 405, 408.

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